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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 468

CARMINE GALANTE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

EUGENE GRESSMAN,
Attorney for Petitioner,
1730 K Street, N. W.,
Washington 6, D. C.

JOHN A. VASSALLO,
Of Counsel

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The petitioner hereby applies for a rehearing of the order of this Court, dated December 9, 1963, denying his petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, which affirmed his conviction and sentence for conspiring to violate the federal narcotics laws, 21 U. S. C. §§ 173, 174. 375 U. S. 940.* Alternatively, if this petition be denied, petitioner requests this Court to direct that the denial be without prejudice to petitioner duly proceeding in the District Court for a reduction of sentence under Rule 35, F. R. Crim. P.

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* Mr. Justice Harlan, on application, has twice extended the time for filing this rehearing petition, the second extension being to and including March 4, 1964.

Reasons for Granting Rehearing

I

This petition for rehearing relates to matters of critical concern to the fair administration of federal criminal justice.

This petition for rehearing is directed primarily to matters of record which, while not resolved by the Court of Appeals, are so obvious in nature, so seriously destructive of "the fairness, integrity or public reputation of judicial proceedings," *United States* v. *Atkinson*, 297 U. S. 157, 160, that this Court should now take appropriate remedial action. Though these matters were not specifically presented as questions in issue in the petition for certiorari, the circumstances detailed herein reveal that this is one of those "exceptional cases or particular circumstances which will prompt a reviewing or appellate court, *where injustice might otherwise result*, to consider questions of law which were neither pressed nor passed upon by the court . . . below." *Hormel* v. *Helvering*, 312 U. S. 552, 557. (Emphasis added.)*

Indeed, the record is so conclusive as to fact that the testimony of Edward Lawton Smith, the main Government witness against petitioner, was bought and paid for, in violation of 18 U. S. C. § 209, that such testimony may be said to have "poisoned the water in this reservoir." *Hysaroski* v. *United States*, 352 U. S. 1, 14. See also *Communist Party* v. *Subversive Activities Control Board*, 351

* See also *Crawford* v. *United States*, 212 U. S. 183, 194; *Weems* v. *United States*, 217 U. S. 349, 362; *Brasfield* v. *United States*, 272 U. S. 448, 450. Rule 40 (2) of this Court's Rules provides that this Court, "at its option, may notice a plain error not assigned."

Cf. *Lamar* v. *United States*, 241 U. S. 103, 117-118, where this Court considered a constitutional question despite the fact that it had not been raised in the lower courts or even in this Court until the filing of a supplemental brief upon a second request for review. *Alaska Company* v. *Adams*, 370 U. S. 530, 536.

U. S. 115, 124; *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233, 242.

Moreover, without such purchased testimony, there would be no direct case against this petitioner. This being a federal criminal case, this Court should now exercise its supervisory jurisdiction to insure that the waters of justice are not so polluted, no matter how late in the day the pollution is brought to this Court's attention. *McNabb* v. *United States*, 318 U. S. 332.

Specifically, the issues which prompt this petition for rehearing are threefold:

1. Does the acknowledged payment by the Government of more than $5,000 to the main witness against petitioner, in violation of 18 U. S. C. § 209,* constitute so gross a perversion of federal criminal justice as to warrant corrective action by this Court?

2. Is the Government's intentional and admitted destruction of a Jencks statement in order "[t]o circumvent the Jencks decision", *Jencks* v. *United States*, 353 U. S. 657, equivalent to a failure to comply with an order to produce so as to require the striking of the witness' testimony under subsection (d) of 18 U. S. C. § 3500, even though purported "secondary evidence" of its contents is produced? [This is the "important question of the construction of subsection (d)" of the Jencks Statute left open by this Court in the first *Campbell* case, *Campbell* v. *United States*, 365 U. S. 85, 98. Whether secondary evidence can in any event be permitted, even in the absence of bad faith, was left unresolved in the second *Campbell* case, *Campbell* v. *United States*, 373 U. S. 487, 491, n. 5.]

3. Does this Court's summary reversal of the contempt conviction of petitioner's co-defendant, *Panico* v. *United States*, 375 U. S. (29), as well as other subsequent occurrences, require a reconsideration of the questions presented in the petition for certiorari?

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* Pertinent portions of the statutes involved, namely, 18 U. S. C. §§ 201, 209 and 3500, are reprinted in the appendix hereto, App. 20-21a.

§ 209 was repealed effective January 21, 1963, but is re-enacted, with minor changes, 18 U. S. C. § 201 (d).

Concededly, the first two questions, arising out of uncontested testimony before the trial court,* were not pursued in, or decided by, the Court of Appeals. At the trial, petitioner was represented disjointedly by three different attorneys, none of whom cooperated with the others. On appeal to the Court of Appeals, petitioner was represented by still other counsel, who was not immediately familiar with the record. And in the proceedings before this Court, petitioner was forced to secure other attorneys. The best efforts of the different appellate counsel, unfamiliar with the involved 25,000-page record of a mass conspiracy trial, and unaided by any of the trial counsel, failed to uncover and pursue these two fundamental errors of law. Only the most diligent pursuit of the record over the past few months, following the hasty consideration necessitated by the shortness of the federal criminal appeal periods in the Court of Appeals and in this Court, has permitted the discovery of these errors.

But the duty of an appellate court to notice and correct plain and fundamental errors which reflect upon the honor of federal justice is unaffected by the diligence or negligence of counsel. Whenever such errors are brought to judicial attention, a federal court has no choice but to take corrective action. *See Bartone* v. *United States*, 375 U. S. 52; *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16. Only by correcting the error itself or remanding the case for appropriate corrective action below can this Court be assured that the "untainted administration of justice" has been observed. *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124.

That vacating the judgment below and remanding the case with directions that the Court of Appeals determine the unresolved questions here raised may be an appropriate remedy is illustrated by the recent action of this Court in *Ferguson* v. *United States*, 375 U. S. 962, No. 198, Oct. Term, 1963. In that narcotics conspiracy case, following the grant

* See "Statement of the Case" in the Appendix *infra*. (App. 22-30a.)

of certiorari by this Court, a new question not previously raised was presented in petitioner's brief on the merits. This Court granted the Government's motion to remand the case to the appellate court to resolve the new question and to determine whether reversal was required under the plain error rule. A similar disposition may be dictated by the circumstances here presented.

II

Does the acknowledged payment by the Government of more than $5,000 to the main witness against petitioner, in violation of 18 U. S. C. § 209, constitute so gross a perversion of federal criminal justice as to warrant corrective action by this Court?

This significant question finds an indisputable answer in the facts of record, detailed at greater length in the Appendix, *infra* (App. 23-6a)[*] that the government transacted in unambiguous terms for the purchase of Smith's testimony "in this case" and that Smith agreed to give testimony only after a government agent guaranteed him $5,000 to help alleviate his financial "difficulty".[*] And in that

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[*] Another witness' testimony at the first trial, later recanted, was also given in consideration for promises of money and other favorable treatment (App. 22a). Cadieux and Smith were the only witnesses who "testified against the . . . defendant, Carmine Galante." J. App. 172a.

[*] Unless the context clearly indicates otherwise, references in parentheses are distinguished as follows: to the joint appendix as filed by all appellants in the Court of Appeals, by J. App.; to the appendix to the petition for writ of *certiorari* heretofore filed, by Pet. App.; to the text of that petition, by Pet.; to the appendix to this petition, by App.; to the stenographic minutes of the trial, by plain numeral's without prefix; to a prior trial of the indictment, by F. Tr.; to petitioner's appendix as filed in the Court of Appeals, by "a" numbers without prefix. Where the stenographic minutes of the trial and the prior trial are both referred to in the same parentheses they are separated by use of a semi-colon.

answer lies the corruption of federal justice that demands corrective action by this Court.

At the time of the purchase of Smith's testimony it was a crime to give "any money . . . or any promise or agreement therefor . . . to any person being, or about to be, a witness upon a trial . . . before any court . . . of the United States . . . upon any agreement or understanding that his testimony shall be influenced thereby . . . ." 18 U.S.C. § 209.

That Smith was influenced in giving testimony, and, in fact, to give testimony at all, by the prosecution's promise and payment of large sums of money, is plain. Apparently no thought was ever given to subpoenaing the witness to appear before the Grand Jury or the trial court. Negotiations with him began with an offer of $5,000 "if he would testify". Later, the witness refused to make his initial appearance before the Grand Jury which returned the indictment without the guarantee of an additional $1,500 payment. At the time he gave testimony against petitioner at trial, he had been receiving, for some two years, $300 to $372 a month as a "special employee" of the government. The witness frankly admitted that his receipt of money from the prosecution was one of his "prime considerations" in testifying.* At the first trial, he understood that his testimony could bring "a reward".

The facts of record strongly suggest fabrication of testimony by Smith only for money. Thus the uncontroverted facts show that Smith did not implicate petitioner in the conspiracy charged for months—neither in his first statement to Rowan in January 1960, nor in his Grand Jury testimony in February 1960—during which he spoke of petitioner only as a man known by him to be part owner of a restaurant in Canada. Smith only incriminated petitioner in April, 1960, at the time he was put on a "per diem" by the government as an additional "inducement"

* Later, when confronted with this admission, Smith testified that he didn't recall his "specific words" (66a). He did recall his earlier admission that he understood that his testimony at the first trial could bring "a reward". (67a).

to testify. This, in spite of the fact that from January to April 1960, Rowan showed Smith petitioner's photograph "about twenty times," "as often as [he] carried it." (App. 25-26a)

No case interpreting § 209 has been found. However, federal courts have applied its counterpart statutes (Chapter 11, Title 18, U. S. C.) which prohibit the payment or promise of money to officers of the United States "with intent to influence [their] decision or action . . ." It has been held that criminal intent is established without a showing that the guilty person intended that the person sought to be influenced act unlawfully or wrongfully. *United States* v. *Labovitz*, 251 F. 2d 393, 394 (C. A. 3); *United States* v. *Schaengold*, 159 F. 2d 941, 943 (C. A. 3); *Kemler* v. *United States*, 123 F. 2d 235, 238 (C. A. 1); *Daniels* v. *United States*, 54 F. 2d 339, 343 (C. A. 9), cert. denied sub. nom. *Appell* v. *United States*, 274 U. S. 744.

The reasoning of the First Circuit in *Kemler* v *United States*, *supra*, is often quoted:

> "Obviously no one would give or offer a bribe unless he expected to gain some advantage thereby, and since attempting to gain an advantage by this means is the evil which the statute is designed to prevent, it can make no difference if, after the act is done the doer discovers that for some reason or another, . . . there was actually no occasion for him to have done it."

It would seem, by analogy, that the payment of large sums of money to obtain testimony is a criminal act without proof that the separate crimes of perjury and subornation of perjury were committed. In other words, the prosecution need not have suborned perjury, or intended to suborn perjury, to have committed the unlawful act proscribed by § 209.

For the reasons given by this Court in *Nardone* v. *United States*, 302 U. S. 379, 383-4, a statute like § 209 cannot be interpreted to exempt the acts of federal agents or prosecutors seeking to "build a case" against an accused, or, as

in this case, one merely suspected, and later accused by the testimony of the purchased witness.

The question is squarely presented whether a conviction based upon testimony given, and agreed to be given, only after the promise and payment of large sums of money by the prosecution is obtained by use of the fruit of wrongdoing and is contrary to the decision of this Court in *McNabb v. United States*, 318 U. S. 332.

Analogy may be made to the cases decided in this Court holding inadmissible evidence which is the fruit of an unlawful wiretap proscribed by 47 U. S. C. § 605, e.g. *Nardone v. United States*, 308 U. S. 338.

The Fifth Circuit has held that *McNabb, supra*, compels the reversal of a conviction based upon evidence obtained by the services of a paid informer employed on a contingent fee basis to obtain evidence as to crimes not yet committed. *Williamson v. United States*, 311 F. 2d 441 (C. A. 5). The Fifth Circuit suggests that such an arrangement might cause an informer to induce a suspect to commit a crime which he had no previous purpose to commit. (at p. 444)

The Fifth Circuit rule protects those susceptible to an inducement to commit crime. This Court has held that even the guilty are to be protected where evidence is obtained by governmental action "inconsistent with ethical standards and destructive of personal liberty". *Nardone v. United States*, 302 U. S. 379, 383. If the prosecution's action in this case be countenanced, the completely innocent are denied protection, for they may be sent to the gallows merely by the word of mouth of the person tempted by "make a case" by the promise and payment of large sums of money. In other words, the reasoning of the Fifth Circuit that certain forms of employment of informers create "opportunities for abuse . . . too obvious to require elaboration" is all the more compelling in this case, where the person bribed does not act to obtain independent evi-

* A total of only $300 was paid the informer in *Williamson*.

dence against a suspect, but, rather, secures the suspect's conviction by his own word of mouth.

The argument that petitioner's contention would have this Court hamper the government in the punishment of crime will recall this Court's answer on a prior occasion:

> "The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."

(*Nardone* v. *United States*, 302 U. S. at 383.)

It would seem, consequently, that petitioner's conviction, based upon such purchased testimony, raises an important question in the administration of federal criminal justice. Can a federal court conviction be premised primarily, if not solely, on testimony purchased by the prosecution? In addition, to the extent that an analogy may be drawn to the cases decided under 47 U. S. C. § 605, the affirmance of petitioner's conviction by the Court of Appeals has so far sanctioned a departure from the usual course of proceedings, as to call for an exercise of this Court's power of supervision. To the extent that Smith's testimony was obtained by means analogous to, or as dangerous as, those employed in *Williamson*, petitioner's conviction is in conflict with the decision of another Circuit.

Under these circumstances, corrective action should now be taken by this Court or, at least, the case should be remanded to the Court below for a determination whether the conviction should be reversed for the reasons urged.

III

Is the Government's intentional and admitted destruction of a Jencks statement in order "[t]o circumvent the Jencks decision", *Jencks* v. *United States*, 353 U. S. 657, equivalent to a failure to comply with an order to produce so as to require the striking of the witness' testimony under subsection (d) of 18 U. S. C. § 3500; even though purported "secondary evidence" of its contents is produced?

This question not only poses a problem of utmost significance in the administration of federal justice, but is one necessarily presented by the record in this case. The facts are detailed at greater length in the Appendix, infra (App. 26-30a). A federal narcotics agent, William A. Rowan, conceded on the witness stand that he had destroyed contemporaneous and verbatim notes of his interviews with Smith "so that they would not become available under the Jencks decision." (F. Tr. 6929). Upon petitioner's motion, the trial court held an extended hearing into the matter, resulting in an oral opinion of the court covering 30 transcript pages (1048-9-521) and denying petitioner's motion to strike Smith's testimony under 18 U. S. C. § 3500(d). That opinion, reproduced in the Appendix hereto (App. 1-19a), raises in unavoidable form at least three critical aspects of the Jencks problem:

A. Is an intentional destruction, for improper motives, equivalent to a failure to comply with an order to produce?

With respect to this question, the Solicitor General has already conceded, and this Court has already inferentially held, that the destruction of a prosecution witness' "statements", for the purpose of depriving an accused of the rights accorded to him by this Court and Congress, does give rise to the sanctions provided in subsection (d) of the Statute, at least where secondary evidence of the contents of the destroyed "statement" is not made available

to the accused. Thus, in the first *Campbell* case, *supra*, this Court stated the Solicitor General's concession thusly:

> "The parties argue whether destruction may be regarded as the equivalent of noncompliance with an order to produce under that subsection, [subsection (d)]. The Government contends that only destruction for improper motives or in bad faith should be so regarded." (At 98)

And in *Killian* v. *United States*, 368 U. S. 231, 241, 244, this Court directed that a new trial take place if the District Court should, on remand, find "untrue in any material respect" the Solicitor General's representations that destroyed interview notes, producible under (3500, "... were made only for the purpose of transferring the data thereon to the receipts to be signed by [the witness], and ... destroyed by the agents in good faith and in accord with their normal practice. ..."

It would thus seem that this Court has held, inferentially at least, that the destruction, for improper motives, of a Jencks "statement" requires sanctions, at least where the "statement" destroyed is not available to the defense in secondary form.

In denying petitioner's motion to strike Smith's testimony, the trial court suggested that "subsection (d) on its face has no application in and of itself" where the "government's failure to produce is due to a prior destruction of the statement." (App. 11a) But this suggestion is out of line with the Solicitor General's concession in the first *Campbell* case and this Court's decision in *Killian*. In addition, condemnation of such destruction would appear to have been contemplated by Mr. Justice Brennan, when, in *Palermo* v. *United States*, 360 U. S. 343, he stated:

> "I repeat that Congress made crystal clear its purpose only to check extravagant interpretations of *Jencks* in the lower courts while reaffirming the basic holding that a defendant on trial should be entitled

> to statements helpful in the cross-examination of government witnesses who testify against him. * * * There inheres in an overrigid interpretation and application of the statute the hazard of encouraging a practice of government agents' taking statements in a fashion calculated to insulate them from production." (At 365-6 (separate opinion)).

It would seem that Mr. Justice Brennan's warning should apply to the destruction, as well as taking, of statements with a view toward insulating them from production.

The trial court also stressed that "[a]t most we have what may be interpreted as a tacit acquiescence by Rowan's superiors in the destruction of the notes." (App. 12a) Also, that "[t]he most that was adduced through Rowan's testimony was a responsive silence or tacit acquiescence on the part of his superiors." (App. 7a) No explanation was tendered by the trial court of what possible relevance this finding may have, unless it was felt to be in some way material to his other suggestion, that a federal agent's acts may not be attributable to the prosecution. (App. 12-14a) It seems quite clear that the trial court's suggestion is entirely inconsistent with the government's concession in the first *Campbell* case and this Court's statements in *Killian*. The suggestion would also seem to be offensive to common sense insofar as it is quite plain that agents such as Rowan, although they may not enjoy the stature of a United States Attorney, are the persons whose responsibility and function it is to "develop" a case" and to interview witnesses in so doing. The trial court, in denying petitioner's motion to strike Smith's testimony, sought to find refuge in a new "doctrinal device" contemplated by the late Judge Clark of the Court of Appeals below in his separate opinion in *United States* v. *Cardillo*, 316 F. 2d 606:

> "We seem generally unwilling to upset convictions when the Jencks Act, 18 U. S. C. § 3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing. Several

> doctrinal devices have been developed to this end. * * * By employing one or more of these doctrinal devices the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this very evil which the Supreme Court has continually repudiated. [Citing cases]. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and *correction must come from the Supreme Court.*" (At 616) (Emphasis added)

It seems to petitioner that the trial court's suggestion is entirely inconsistent with the purposes of the Statute and the decisions of this Court, both in construing the Jencks Act, and in rejecting convictions otherwise obtained by means less than fair.

The trial court also found relevant that the prosecutor delivered to petitioner unrelated documents which he was not obliged to deliver under § 3500, e.g. grand jury minutes. (App. 16a). However, such fact, under similar circumstances, was not said by this court to be in any way relevant to an accused's rights under § 3500. *Rosadilla v. United States*, 360 U. S. 367, 369.

B. Does the production of purported secondary evidence bar the sanctions of § 3500(d)?

This question, which assumes that the preceding question is answered in the affirmative, is that raised but not decided in the second *Campbell* case, *Campbell v. United States*, 373 U. S. 487, 491, n. 5, namely, whether the production of purported "secondary evidence" of the contents of a Jencks statement destroyed in order "[t]o circumvent the Jencks decision" will bar the sanctions of § 3500(d).

In denying petitioner's motion, the trial judge placed most emphasis upon his finding that the Rowan report,

turned over to the defense, was a "substantially accurate reproduction of the [destroyed] notes Rowan had taken during his interviews with Smith." (App. 18a). The trial court, thus, assessed the thought that the Rowan typewritten progress report was probably producible both under (e)(1) and under (e)(2) as a substantially identical copy of contemporaneous verbatim notes. (App. 16a).

The court found Rowan's testimony that he added to his report "things that Smith had not told [him]" and "left things out" that he considered "unimportant" (F. Tr. 6936) an "isolated expression" (App. 4-5a) and concluded that his finding was warranted by Rowan's affirmative answer to the broad question of whether the report contained "the substance of the testimony elicited from Smith." The court ignored other Rowan testimony on the subject." (7719).

Several things are absolutely plain. Rowan destroyed his substantially verbatim and contemporaneous notes of Smith's statements to him about the conspiracy charged. His expressed purpose in so doing was to deny the defense access to those statements as required by law. It is inconceivable that Smith, presented with petitioner's photograph "at least twenty" times during Rowan's interviews of him (App. 25-26a), would not have mentioned petitioner at all in his statement—perhaps only to absolve him of com-

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* The trial court's findings, insofar as based upon his expressed consideration of former agent Rowan as "a defense witness * * * in the second *coram nobis*" (App. 5a) may have been arrived at under the mistaken notion that the hearing conducted pursuant to § 2500 was "an adversary proceeding in the nature of a trial governed by rules governing the allocation between the parties and the burdens of proof and persuasion." *Connelly v. United States*, 365 U. S. 85, 93. If this Court should grant certiorari, but ultimately determine other questions raised against petitioner, it may be shown that this expression on the part of the trial court signals errors in the conduct of the *coram nobis*, which require reversal under the first *Connelly* case, *supra*, in any event. Thus petitioner's counsel was not permitted to "lead" Rowan on cross-examination. F. Tr. 6905-10.

pliçity in the crime charged. One may wonder what other reason Rowan would have to show Smith petitioner's photograph twenty times if it were not the reason that petitioner was absolved of complicity in the crime at the outset, and only incriminated later, after pay. Yet the Rowan report, which was eventually produced for the defense, contained no mention of petitioner. (Di Pietro's Ex. AO in Evidence).

Rowan very clearly testified that in preparing his report with use of Smith's verbatim statements to him, he edited things out and added things to it.* One may question precisely what matter contained in Smith's original statement to Rowan was not contained in Rowan's report. Thus, Rowan admitted on the witness stand that Smith spoke of petitioner only as a man known by him to be part owner of a restaurant in Canada (App. 253a). This did not find its way into Rowan's typed progress report. Presumably, it was one of the things Rowan edited from Smith's statement as "unimportant."

However, even absent such considerations, it seems absolutely clear that the defense was not obliged to rely upon Rowan's editorial skill, especially given his expressed purpose, "[t]o circumvent the Jencks decision." (F. Tr. 7162) A contrary notion seems to petitioner to be absolutely inconsistent with the mandate of this Court in *Jencks*, later reaffirmed by Congress with the enactment of 18 U. S. C. §3500. As was stated by this Court in *Jencks, supra:*

> "Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." (At 667)

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* That he testified in the affirmative when asked the broad question of whether the report contained "substantially" what Smith had told him is not contradictory.

Rowan testified, also, that he made other changes in transcribing his verbatim notes of Smith's statement into his progress report so that "it wouldn't fall under the Jencks decision." (App. 29-30a) Later, Smith did his part "[t]o circumvent the Jencks decision", for he denied ever having seen the Rowan report or ever having made a statement to Rowan. (App. 27a)

The question is presented whether the government's editing of the Smith statement is not that sort of "unilateral determination of the prosecuting arm of the government" already forbidden by this Court, *Palermo* v. *United States*, *supra*, 360-361 (separate opinion).

It seems quite plain that the original statement taken by former agent Rowan would have been ordered to be produced at trial, were it not destroyed. 18 U. S. C. § 3500(c)(2). The trial court correctly observed that the typewritten report might also have been required to be produced under 18 U. S. C. § 3500(c)(1) irrespective of its similarity or lack of similarity to Rowan's verbatim notes of Smith's statement. (App. 10a)

Quite possibly, were both statements made available to petitioner, inconsistencies between them may have effectively been used in the cross-examination of Smith, the main witness against petitioner. But speculation is not required, for this Court has said that an appellate court should not guess what an accused's attorney might have found useful for impeachment purposes in withheld documents to which the accused was entitled. *Rosenberg* v. *United States*, 360 U. S. 367, 371.

C. Is the harmless error rule applicable in these circumstances?

By virtue of his somewhat questionable findings, then, the trial court held, in substance, that the government's bad faith destruction of a Jencks Act statement was "harmless error". The question is presented above whether the "harmless error" principle may properly be applied when documents are not produced under § 3500 because those documents were destroyed with the express purpose of frustrating that Statute.

The question is here presented whether the non-production of "statements" demanded under § 3500 may be "harmless error" where (a) the non-production is caused by an intention to frustrate the Statute, (b) the lower court, in employing the "harmless error" doctrine to deny a motion under subsection (d) of the Statute, was unable to compare the secondary evidence with the "statement" withheld from the accused by reason of its improper destruction, and (c) the witness denied ever having seen the "secondary evidence" and any responsibility for its contents.

Although in *Rosenberg, supra*, this Court has held (four justices dissenting on the facts) that the non-production of documents demanded under § 3500 may be harmless error, in that case there was no suggestion that the government acted with the intention of frustrating the Jencks Statute. Also, there the lower court, whose finding of harmless error was sustained by this Court, was able, by an examination of the withheld statement, to determine whether its contents were imparted to the defense in another form.

This Court has never passed upon a lower court finding of harmless error in the withholding of *Jencks* materials by the prosecution where, as in this case, the lower court was unable to satisfy itself, by actual comparison, that the "statement" withheld was substantially identical to "secondary" materials produced by the prosecution for use by the defense.

In this case, all that the trial court could rely upon in finding harmless error was its subjective impressions of the subjective expressions of the federal agent who testified that he deleted only the "unimportant" from the witness' statement in preparing the secondary document produced for the defense. Presumably, Rowan considered "unimportant" what Smith told him about petitioner, the "twenty times" he was shown petitioner's photograph by Rowan, for petitioner's name is not mentioned in the secondary document i.e. the Rowan typewritten progress report. (App. 25a) The court apparently assumed that the

federal agents addition of matters not told him by the witness was similarly "unimportant."

A resolution of the question presented is important to the fair administration of justice in the federal criminal courts. This Court should grant *certiorari* and decide the question or remand to the Court of Appeals below for decision.

Finally, it should be noted that the federal agents negotiated, with large sums of money, for the purchase of testimony against petitioner after having had their suspicions kindled by the use of unlawful wiretaps. A federal agent then destroyed a "statement" of the witness producible under § 3500, so that it would not be available to petitioner in his attempts to impeach the purchased testimony. When the agent was called to give testimony as to the existence of another *Jencks* statement, strangely absent from all government files, he was sought to be intimidated by other federal agents. (App. 27a) Such conduct by governmental agents falls far below the minimal standards of fairness required in the prosecution of a federal criminal offense.

Congress has underlined the criminality of the prosecution's purchase of Smith's testimony against petitioner by the enactment, in 1962, of 18 U. S. C. § 201(h) which makes criminal lesser conduct.

The suppression of impeachment materials by the federal agent, with the express design of frustrating the mandate of this Court in *Jencks*, is similarly most sub-standard behavior.

The acts of other federal agents in attempting to intimidate their former associate from answering the direction of the trial court to give testimony required by the Jencks Statute (*Palermo v. United States*, 360 U. S. 343, 354-55), is even more shocking.

The ultimate question thus presented is whether the actions of the Government in the prosecution of petitioner are "incompatible with our standards for the administra-

tion of criminal justice in the federal courts, and must therefore be rejected." *Jencks* v. *United States*, *supra*, 668. Viewed in its most favorable light, the activity of the prosecution represented an overzealousness which was violative of the interest of the United States in criminal prosecutions, which interest "... is not that it shall win a case, but that justice shall be done. ..." *Berger* v. *United States*, 295 U. S. 78, 88.

It would be salutary for this Court to grant *certiorari* to review these delictions, or, at least, remand to the Court of Appeals below for a decision in light of the arguments heretofore advanced.

IV

Does this Court's summary reversal of the contempt conviction of petitioner's co-defendant, *Panico* v. *United States*, 375 U. S. 29, as well as other subsequent occurrences require a reconsideration of the questions presented in the petition for certiorari?

Several occurrences since the filing of the petition for writ of certiorari warrant a reconsideration of this Court's denial of that petition.

The questions presented in the petition were cast against a background of the trial judge's impressions, approved by the Court of Appeals and reiterated by the Solicitor General in opposing review, that some of the co-defendants were unduly manipulating their right to counsel and otherwise acting in concert for the purpose of aborting the trial. (Pet. App. 34a, 37a). These impressions were formulated, even as to matters occurring outside the judge's presence, without any semblance of a hearing or inquiry for the purpose of taking or considering evidence on these matters. (Pet. 28-30)

Perhaps the most ill and violently behaved co-defendant was Salvatore Panico. The Court of Appeals below

sustained the trial court's refusal to sever Panico, refusal to order psychiatric examinations at the outset to determine whether he was apt to engage in further conduct prejudicial to his co-defendants, and the denial of motions for the declaration of a mistrial. Panico had invaded the jury box on the very first day of trial, throttling its members and screaming vilifications at them. (Pet. App. 20a) On two other occasions, when remanded to detention headquarters, Panico attempted suicide, both attempts resulting in the delay of trial. (Pet. App. 21-22a) The Court below pointed out the suspicious nature of the suicide attempts. (Pet. App. 22a) On another occasion Panico claimed that he had been drugged and suffered lapse of memory. (Pet. App. 21a) On other occasions he screamed incriminating remarks about co-defendants. (Pet. 19-20)

In ruling that the trial court did not abuse its discretion, the Court of Appeals relied upon its finding on Panico's appeal from his conviction by the trial court of contempt. There it found that the trial court's conclusion ". . . with respect to the deliberate and calculated nature of [Panico's] acts [did not constitute] reversible error." (Pet. App. 24-25a).

However, since the filing of the petition for *certiorari* this Court has reversed the judgment of the Court of Appeals sustaining Panico's contempt conviction based upon his actions above described, on the ground that it was error for the trial court to decide summarily that Panico was not too mentally ill to form the requisite criminal intent to be guilty of contempt. In so doing this Court pointed out that conflicting psychiatric testimony was heard at the first trial on the different question whether Panico was mentally fit to stand trial, and, that since shortly after his contempt conviction, Panico has been confined to a state mental hospital after having been found, by state appointed psychiatrists, to be suffering from schizophrenia. *Panico v. United States*, 375 U. S. 29.

On another occasion, when Panico accused another co-defendant of being a "convicted dope pusher", the trial court observed, in ruling upon a motion for a mistrial, that "It is obviously a put up job." (Pet. App. 28a). Petitioner was accused by Panico of having attended the notorious Apalachin meeting "where they got all the orders for these narcotics pushers."*

It is quite plain, therefore, that both the trial court and the Court of Appeals explained away otherwise reversible error by reference to the trial court's impressions that at least some defendants were acting in concert to abort the trial. It is also quite plain that the trial judge, in formulating that impression, perhaps justified, relied primarily upon his finding that Panico behaved in a way contumacious of the court and was mentally capable of doing same. This Court has ruled that the trial court incorrectly came to that conclusion. It would seem, thus, that a least one prop employed by the trial court and the Court of Appeals in justifying the trial court's actions has been broken. The questions presented in the petition should therefore be reconsidered in light of this new development underscoring the basic premise of the lower courts' feeling that petitioner's procedural rights were fully respected.

At the beginning of the trial, moreover, the trial judge refused to allow petitioner to substitute counsel even though petitioner had other counsel in court ready, willing and able to represent him without delay. The trial court thus saddled petitioner, against his will, with an attorney not chosen by him to represent him. Later, when petitioner's new counsel, who was only allowed by the trial court to be co-counsel, sustained an accident, the lawyer who sought to be relieved at the first day of trial was thrust back into the

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* Although the Court of Appeals below reversed Panico's conviction on the ground that the trial court erred in refusing him the right to testify in his own behalf, it summarily denied petitioner's contention that he could have shown on cross-examination that Panico's Apalachin charge was false.

case although fully unprepared. (Pet. 24-6a) It is quite clear, and the Court of Appeals below points out, that the trial court's actions at the beginning of trial with respect to petitioner's right to substitute counsel, where no delay could be occasioned thereby, can be explained only by the trial judge's impression—now made questionable by the Panico contempt reversal—that Panico and other defendants were manipulating that right with a view to aborting, or at least delaying, the trial. (Pet. App. 32a) The Court of Appeals also observed that on the very first day of trial, "there were three defendants who did not have counsel in court." (Pet. App. 32-3a) Any question of the *bona fides* of the heart illness which required the absence of at least one of those attorneys, Sylvester Consentino, should be removed by the fact that Mr. Consentino, on February 4, 1964, died of a heart attack. (*New York Times*, February 5, 1964).

The trial court's assignment of new counsel to represent petitioner toward the end of trial, with only a day to prepare, was justified by the trial court and by the Court of Appeals below by the fact that the accident which resulted in the absence of petitioner's counsel from trial resulted in no "objective symptoms of injury." (Pet. App. 29, 36a) Petitioner's attorney, who had been crippled by polio in youth, had sustained a fall on a New York City sidewalk, and was hospitalized. (Pet. 10, Reply Brief on Appeal to the Court of Appeals, 15) Her law suit against the City of New York for damages due to that accident is pending in the Supreme Court of the State of New York, Bronx County. (Tort Division, No. 89687, Controller's Number T. 178346) Despite the liberality with which motions for summary judgment are entertained in New York State Courts when sham law suits are brought, no such judgment has been rendered nor for that matter has any been sought by the City of New York. It is quite plain that the actions of the trial court with respect to petitioner's counsel are inexplicable other than by reference to several suspicious happenings at trial. It has been

shown that at least some of the suspicion was unwarranted, or, at least, formulated rashly and without compliance with fair standards of justice.

It is submitted that, on the basis of the occurrences heretofore stated, the questions tendered by petitioner in his petition for *certiorari* should now be reviewed.

Conclusion

For the foregoing reasons, this petition for rehearing should be granted and the order of December 9, 1963, denying certiorari, should be vacated. Plenary review on certiorari should then be ordered or, alternatively, the case remanded to the court below for consideration and decision as to the issues not previously resolved.

Should this petition be denied, however, petitioner requests that the denial be accompanied by an order protecting petitioner's right to proceed for a reduction of sentence under Rule 35, F. R. Crim. P.*

Respectfully submitted,

EUGENE GRESSMAN,
Attorney for Petitioner,
1730 K Street, N. W.,
Washington 6, D. C.

JOHN A. VASSALLO,
Of Counsel.

* On January 22, 1964 Mr. Justice Harlan denied petitioner's motion, consented to by the Solicitor General, for an order recalling notification of this Court's denial of his petition for writ of certiorari. The motion was made to obviate the possibility that a motion for reduction of sentence, to be made if this Court acts unfavorably upon this petition, may be considered to be untimely. Mr. Justice Harlan denied petitioner's motion with leave to renew request the alternate relief above sought.

Certificate of Counsel

I, Eugene Gressman, being the attorney for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Eugene Gressman

APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

60 CR. 436

UNITED STATES OF AMERICA,

against

WILLIAM BENTVENA, *et al.*,

Defendants.

LEVIT, D. J.:

This is an opinion and decision on the defendants' motion to strike testimony of the witness Smith.

The defendants have moved to strike the testimony in this case of the Government witness Edward Lawton Smith. This motion is said to be grounded upon subsection (d) of Section 3500, Title 18, United States Code, which provides:

"If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."

The defendants contend that the inability of the Government to produce the original handwritten notes of

former narcotics agent William A. Rowan, taken during his interviews with the witness Smith, because of the destruction of said notes by Rowan prior to the commencement of this trial, is equivalent to an election of noncompliance on the part of the Government requiring application of the consequences set forth in subsection (d) above.

The salient facts bearing on the issue presently before the court are as follows:

Earlier in the course of this trial, pursuant to an application by defense counsel, a voir dire examination was held on January 5, 1961, in the absence of the jury, of course, of Federal narcotics agents George Gaffney, Charles Ward, John Dolce and Patrick Biase, who had dealt with Edward Smith during the investigation of the instant case in order to ascertain the existence of any statements, reports or memoranda relating to the testimony of Smith which might fall within the purview of Section 3500, popularly known as the Jencks Act. (See Minutes Nos. 3264 and 65, 3305 and 06, 3048] through 3353.)

During the preliminary examination of former agent William A. Rowan on January 6 and 9, 1961, testimony was elicited to the effect that Rowan had interviewed Smith on several occasions during January and February of 1960 and had taken down notes of the information given by Smith. (See Minutes Nos. 3675, 3677.)

Rowan testified that he ultimately transcribed the contents of his notes into a typewritten report. (See Minutes Nos. 3786 and 3787.)

"The Court: Well, in other words, whatever you had transcribed is merely what you had written down, is that so, without any addition or subtraction, generally speaking, or modification?

"The Witness: I might have put in better verbiage, but substantially what I had been told.

"Q. By Smith?

"A. Yes, sir."

(See Minutes No. 3694.)

As a result of Rowan's testimony, in pursuance to the Court's direction, the Government produced an updated progress report prepared by Rowan which was marked Government 103 for identification. The report was available to defense counsel "as a proper subject of 3500." (See Minutes No. 3740.) Rowan identified 103 as "the substance of the testimony that I had elicited from the witness Smith." (See Minutes No. 3729) and consistently maintained that 103 constituted the sole report or memorandum which he had prepared which embodied the conversations which he had had with Smith regarding the latter's activities in this case. (See Minutes Nos. 3737, 3772, 3773, 3783, 3784.)

"Q. (by Mr. Fuller) Did you have occasion to recite substantially verbatim the conversations you had with Mr. Smith in any report he (sic) ever prepared for the Federal Bureau of Narcotics other than 103?

"A. No, sir."

(See Minutes 3796.)

It was further elicited from Rowan that the report designated 103 was transcribed directly from his handwritten notes. There were no intervening drafts prior to the final report represented by Exhibit 103. (See Minutes Nos. 3798 and 99.)

In view of the discovery of the existence of 103, certain counsel who had already concluded their cross-examination of Smith were permitted to reinterrogate him with regard to 103. The record clearly reflects an extensive and generous utilization by defense counsel of the impeachment opportunities offered by 103 in relation to Smith's trial testimony.

Smith, however, while admitting that he had discussed the facts in this case with Rowan on various occasions denied, during his cross-examination, that he had ever seen Rowan taking down notes during these interviews. (See Minutes Nos. 4449, 4454, 4463 through 69.)

Smith, moreover, testified that he had never seen the report 103 and had never read or corrected it. (See Minutes 4471 through 75.)

This rather sharp and emphatic conflict between Smith's testimony and that of Rowan presents a somewhat anomalous situation. Rowan stated that when he interviewed Smith he noted down the story narrated by Smith, writing at times in the first person and at other times in the third, the ratio being "about fifty-fifty." (See Minutes Nos. 6902 and 03.)

These notes were later transposed into report 103, which was written solely in the third person. (See Minutes No. 6904.)

When questioned by the Court as to why he had employed only the third person in 103 Rowan replied: "So that it wouldn't fall under the Jencks decision." (See Minutes No. 6908.)

We also have Rowan's testimony that he read from his handwritten notes to a stenographer, who typed up the report identified as 103. (See Minutes No. 6932.) In other words, Rowan dictated 103, using his notes.

He further testified that he then compared the typewritten transcription with his notes as follows:

"The Court: How did it appear?

"The Witness: It was what I had in the notes except that it had been changed to the third person in all instances.

"The Court: That was the only difference in substance at least?

"The Witness: That's right, sir." (See Minutes 6933 and 34.)

In short, therefore, in the light of all the credible evidence adduced in this court, principally from the testimony of former agent Rowan, it can be said with reasonable certainty that report 103 reflects substantially verbatim the information Smith had related to Rowan regarding the facts in this case. This court is convinced of the authenticity of 103, and the circumstances surrounding its origin clearly establish a direct and unbroken relation to, and emanation from, Rowan's original notes. The defendants argue, however, that Rowan stated at the end of the second voir dire examination that: "I did make some additions

involving the case, about things that Smith had not told me, and I left things out that, in my opinion, were not important." (See Minutes 6935-36.)

However, this isolated expression must be carefully evaluated and compared with the rest of Rowan's testimony and his consistent reiteration of the authenticity and accuracy of 103, vis-a-vis his original notes. Moreover, if reasonable credence is to be afforded Rowan's testimony, Rowan discussed the final report 103 with Smith and went over the report with the witness to check its accuracy. (See Minutes 3751, 3767-69.)

Consequently, according to Rowan's own testimony, and he was called as a defense witness to testify in the second voir dire, Smith was made aware of the contents of 103, and in confirming the accuracy of its contents, in effect, adopted the report as his own statement.

The original handwritten notes were subsequently destroyed by Rowan after being transcribed into his report. (See Minutes 6904, 6933-34.) Rowan testified at the second voir dire examination in February that he destroyed his notes "so that they would not become available under the Jencks decision." (See Minutes 6929; see also Minutes 7162.) Yet, when interrogated previously during the first voir dire in January about the disposition of these same notes, Rowan then declared: "I destroyed them myself. I was finished with them." (See Minutes 3799.)

He also denied at that time that there had been any directive from his superiors in the Federal Bureau of Narcotics to destroy the notes. (See Minutes 3799.) Rowan subsequently maintained that he destroyed his notes "because it was agreed that I would destroy the notes after I made up the report." (See Minutes 6911.)

According to Rowan, the matter was discussed at a meeting at which his superiors, District Supervisor George Gaffney and Group Leader Martin Pera were present in August or September, 1959. (See Minutes 6911-6912.) However, Rowan was unable to recall exactly what was said by the individuals present at this meeting; he said

that the substance of the discussion was that "I should follow the course that I took in another investigation," the Aviles case. (See Minutes 6920.) (See *United States* v. *Aviles*, 2 Cir., 1960, 274 Fed. 2d 179.)

Rowan stated that he had discussed the destruction of records in the Aviles investigation with certain of his superiors in the Bureau of Narcotics but again was unable to give even the substance of these conversations. (See Minutes 6922-23, 6926-27.)

While there was testimony by Rowan that he had discussed the Jencks statute with his then superiors prior to the procedure he took in the Aviles case, Rowan denied, however, that he had received explicit instructions from anyone to destroy records in the Aviles investigation. (See Minutes 6923.)

The record mirrors the uncertain character of Rowan's testimony pertaining to the sequence of events leading to the destruction of his notes in the instant case, and I quote from the record:

"The Court: . . . Why did you destroy the notes in this case?

"The Witness: So that they would not become available under the Jencks decision.

"Q. Was this destruction done with the knowledge of your superiors?

"The Court: Just a moment. I assume it would have to be some knowledge at the time or prior to the time and not afterwards.

"Mr. Wadden: Yes, sir.

"The Court: Now you may answer.

"The Witness: Yes, sir.

"The Court: What is the answer?

"The Witness: It is, yes, sir.

"The Court: How? Did anybody tell you to destroy records, to destroy notes? Just answer that question.

"The Witness: Again, no, no.

"The Court: Did you tell any of your superiors that you were going to destroy the notes?

"The Witness: Yes, sir.

"The Court: Which one, that you told, that you say you told that you were going to destroy the notes of the Smith interview; do you recall any particular person?

"The Witness: Agent Pera and Mr. Gaffney.

"The Court: Well, when did you tell Pera that you were going to destroy the notes?

"The Witness: I don't recall, sir.

"The Court: What did he say, if anything, when you made some statement to him about it? What did he say?

"The Witness: He just acquiesced to what I told him I was going to do. He didn't say anything.

"The Court: He didn't say anything? You say you told it to Gaffney, too, or anyone else? Did you tell anyone else that you were going to destroy your notes in this Smith matter?

"The Witness: I don't recall, sir."

The Court: After an interruption:

"The Court: Did you tell Gaffney that you were going to destroy your notes on Smith?

"The Witness: Yes, sir.

"The Court: When?

"The Witness: I don't recall, sir.

"The Court: What if anything did he say?

"The Witness: He didn't say anything, sir.

"Q. Did you tell him prior to the time the notes were destroyed?

"A. Yes, sir."

(See Minutes 6930 and 6931.)

Thus, according to Rowan, he notified certain of his superiors in the Narcotics Bureau that he was going to destroy his interview notes on Smith, but the most that was adduced through Rowan's testimony was a responsive silence or tacit acquiescence on the part of his superiors.

Rowan, who had been a Federal narcotics agent since October 8, 1956, was unable to recall one specific occasion during past investigations he had worked on where he had

preserved or kept interview notes. (See Minutes 7109, 7112.)

During his career as a Federal agent, Rowan testified he must have interviewed from fifty to seventy-five witnesses in the course of his duties. (See Minutes 7105-7110.) He would take notes of the information related to him by these witnesses between half to three-quarters of the time. (See Minutes 7108-7110.) These notes would on occasion be transcribed on the Bureau's narcotic form 184. (See Minutes 7111.) At times, Rowan would give his notes to a fellow-agent working with him on the same case who would transcribe the contents of the notes into a report; on other occasions Rowan was himself given notes by other agents which he would transcribe into typewritten reports. (See Minutes 7111.)

As to the customary disposition of these original notes, Rowan testified as follows: "The notes might sit on my desk or I'd destroy them, throw them away after I was finished putting them into the 184's." (See Minutes 7111-7112.) As mentioned above, Rowan could not recall "one specific occasion" when he kept or preserved his notes. (See Minutes 7112.) When queried as to why such notes were ultimately destroyed, Rowan answered: "Well, it wasn't a matter of destruction. I was finished with them at that point and I tore them up and threw them away." (See Minutes 7112.) This past practice conforms with Rowan's original explanation as to why he disposed of the notes in this case: "I destroyed them, myself. I was finished with them." (See Minutes 3799.) When viewed against this background, the pattern of Rowan's conduct becomes more clearly discernible.

While admitting that he was finished with his handwritten notes on Smith and no longer needed them once they had been transcribed into a report, Rowan nevertheless asserted, when called by the defendants during the second voir dire, contrary to his earlier testimony (See Minutes 3799.)—that he destroyed these notes "to circumvent the Jencks decision." (See Minutes 7113-7114, 7162.)

In order to determine the question before it, the Court is compelled to resolve the self-contradictory testimony given at times by Rowan, as well as those conflicting declarations made by Smith. During oral argument on the instant motion, the attorneys for the defendant Salvatore and Carmine Panico argued:

"* * * The statement of Smith that he never saw the report, that he never was interviewed in this case by Rowan is palpably false for Government's Exhibit 103 to a great degree parallels the testimony Smith gave before the grand jury and in this court. This report is not a figment of Rowan's imagination. He could not have described Smith's movements and Smith's implication of the various defendants in this case unless Smith told him about it." (See Minutes 9868.)

Yet, the same counsel later declared:

"* * * In view of Smith's testimony that he never was interviewed by Rowan and Rowan's statement about the wilful destruction of the notes, the typewritten interview report was but a sham and a subterfuge to deceive defense counsel and to contravene Section 3500." (See Minutes 9870.)

It would seem to be the principal contention of the defendants that the destruction of Rowan's handwritten notes thus deprived them "of a mighty weapon of defense." (See Minutes 9869.)

The Government, for its part, maintains that Rowan's testimony clearly establishes that the typewritten report 103 "was in effect in substance what Smith had told him and he took it from his handwritten notes which * * * Rowan took down as best he could everything that Smith told him." (See Minutes 9874.) It argues that there is no indication that Smith ever saw Rowan's handwritten notes or read them. The Government points out that Rowan, while an agent, always destroyed his interview notes in past investigations after he had put them into some form of a report. (See Minutes 9875.) Moreover, it is claimed that any subjective intent on Rowan's part to circumvent

the Jencks Act is essentially immaterial since this intent was in fact frustrated when the report transcribed from these same notes was actually made available to the defendants for impeachment purposes during the cross-examination of Smith.

As a result of the voir dire hearing held on January 6th and 9, 1961, the Government was ordered to produce all reports and memoranda prepared by former Agent Rowan during his investigation of this case. After examining those papers in camera, the Court decided that the only report dealing with Smith's trial testimony which came within the purview of Section 3500 was the undated progress report prepared by Rowan, to wit, Government Exhibit 103 for identification. This Court concluded on the basis of all the credible evidence adduced during the preliminary hearing that Exhibit 103 constituted at least "a substantially verbatim recital of an oral statement" made by Smith to Rowan "recorded contemporaneously with the making of such oral statement." (See 18 USCA § 3500 (e), (2).) Moreover, despite Smith's declarations to the contrary, Rowan's testimony that he went over the report 103 with Smith, if so believed, indicated that 103 might also be "a written statement made" by the witness Smith and "otherwise adopted or approved by him," which would satisfy the requirements of subsection (e) (1) of Section 3500. In any event, the Court ordered the Government to deliver 103 to defense counsel, and this was done.

It would seem that the crucial issue for determination is whether the destruction of whether [sic] Rowan's original notes violates the Jencks Act and thus compels this Court to strike from the record the testimony of the witness Smith. The question necessitates the construction of subsection (d) expressly left open by the Supreme Court in Campbell *v.* United States, decided January 23, 1961, 365 U. S.

Subsection (d) purports to penalize the Government for non-compliance with an order of the Court under paragraph (b) or (c) of Section 3500 to deliver to the defendant any

such statement or such portion thereof as the Court may direct, thus presupposing an election by the Government not to comply with an existing court order. In this case the Government has acceded to, and complied with, all orders of the court requiring production and delivery to the defendants of all documents in the possession of the Government found to be available to the defendants under Section 3500. One may argue whether there can be an election by the Government not to deliver a statement when called upon to produce the same when such statement is not in the Government's possession at the time of the court order. Consequently, it would appear that subsection (d) on its face has no application in and of itself in such a situation. This would appear especially true when the Government's failure and inability to produce is due to a prior destruction of the statement.

However, the defendants charge that the Government, in effect, has made an election not to produce under subsection (d) at the time of the destruction of the notes. (See Minutes 9883.) They contend that the fact that such demandable documents are no longer in the possession of the Government at the time the Court orders their production during the trial is no defense; that a request by defendants for such notes after their destruction is made known would represent a futile gesture. (See Minutes 9883.)

While the statute plainly refers to a "statement * * * of the witness in the possession of the United States," Justice Frankfurter, dissenting in Campbell, did view the majority opinion in that case as implying that a defendant would be entitled to statements which the Government did not possess at the time of the trial. In rejecting this construction, Justice Frankfurter observed:

"* * * Nothing in the legislative history of the Act remotely suggests that Congress' intent was to require the Government, with penalizing consequences, to preserve all records and notes taken during the countless interviews that are connected with criminal investigation by the various branches of the Government." (354 U. S. at)

See also Senate Report No. 981 of August 15, 1957, accompanying Senate Bill 2377, which Senate Bill was passed as the Jencks Act in lieu of the House Measure in 2 U. S. Code Congressional and Administrative News, 85th Congress, 1st Session, 1957, 1861-1862.

However, as Justice Frankfurter further suggests, another rule may obtain where "documents which are demandable for production under the Jencks Act are no longer in existence, and for * * * a reprehensible reason chargeable to the Government." (365 U. S. at .)

Here we have Rowan's somewhat vague and indefinite testimony concerning the destruction of his notes, and the alleged complicity of his superiors regarding their disposition, in marked contrast to other areas of his testimony. At most we have what may be interpreted as a tacit acquiescence by Rowan's superiors in the destruction of the notes. Rowan himself explicitly disavowed any explicit instructions to destroy them. Yet, according to Rowan's own testimony, in disposing of his notes on Smith, he did therewhat he had always done before with his interview notes. The disposition of the notes concerning Smith is colored however by Rowan's supposed injection of a subjective intent that they be destroyed in order to circumvent the Jencks Act.

Another facet of the problem which presents itself is whether the Department of Justice should be precluded or estopped from utilizing the testimony of Smith in the prosecution of this case because of the actions undertaken by subordinate members of the Federal Bureau of Narcotics in the Treasury Department. No statutes or regulations can be found which authorize a federal narcotics agent to act on behalf of the Department of Justice or preclude, hinder, thwart or otherwise create by his actions an estoppel against the prosecution of a crime against the United States. See 5 U. S. C. A. §§ 282, 282(a); 21 U. S. C. A. §§ 171, 172, 173, 174, establishing the Bureau of Narcotics and defining its functions and scope of authority. See also 5 U. S. C. A. § 291 relative to the establishment of

the Department of Justice, and 5 U. S. C. A. 300 regarding the appointment of officials by the Attorney General for the detection and prosecution of crimes against the United States.

In McDonald *v.* United States, 8 Cir. 1937, 89 F. 2d 128, cert. denied, 1937, 301 U. S. 697, rehearing denied, 1937, 302 U. S. 773, involving an alleged violation of the federal anti-kidnapping act in which marked ransom money had been exchanged for unmarked money, a government witness, acting under orders from his superiors in the Treasury Department caused the marked money to be called in and macerated by the Treasury Department. In affirming the trial court's admission of secondary evidence offered by the government with regard to the macerated money, Circuit Judge Faris wrote:

"* * * While it is to be considered that an unfavorable inference arises in the trial of a lawsuit against a party who destroys primary evidence, the penalties and the odium are personal (22 C. J. 109; 2 Chamberlayne on Evidence, 1078a), and the extreme penalty of refusing to admit secondary evidence, of a fact or facts vital to the prosecution here, ought not to be inflicted because of the bad judgment of a minor official, or a bureau of the government."

And further stated in the same opinion, and I quote:

"* * * Back of the harsh rule contended for by appellant—if indeed this rule has not been outmoded or modified (22 C. J. 109)—lies the doctrine of estoppel, and ordinarily the United States cannot be estopped by the acts of its subordinate officials and agents. Wisconsin Railway Co. *v.* United States, 164 U. S. 190, 210, 17 S. Ct. 45, 41 L. Ed. 399; The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 196. But we think a better answer to this somewhat unique contention of appellant is that no court ought so far to stultify itself as to hold that the United States may be estopped, precluded, hindered, or thwarted in its sovereign duty to

prosecute for crimes by the fact that a subordinate official or one among its many bureaus, disregarding co-ordination, saw fit in pais to do an unwise, hasty, unnecessary, and improvident act. The only exceptions, if in fact they are such, are entrapment, and unlawful search and seizure. See Sorrells *v.* United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249,"

these quotations being from 89 F. 2d at 138.

However, this aspect need not detain us here in view of other considerations which will become subsequently discernible.

It would seem that this Court must perforce look to not only what was attempted or done by Rowan, that is, the composition of 103 in the third person and the destruction of his original notes, however wilful or malevolent his intentions and actions may have been, but also, and more importantly, to what was in fact accomplished by such actions, namely, the overall consequences ensuing from Rowan's conduct and their net effect and impingement, if any, upon the rights of the defendants in this case.

Certainly, whatever Rowan's purpose, his mere grammatical conversion of Smith's narration of the facts in this case from a first and third person account in the interview notes to a final report written only in the third person worked no significant alteration in the ultimate nature of the report so as to immunize the latter to the applicable provisions of the Jencks statute. The report, viz., Exhibit 103, was in fact made available to the defendants immediately upon the discovery of its existence, location, and character. Photostatic copies thereof were accordingly distributed by the Government to defense counsel in order to facilitate utilization of the report during cross-examination of Smith. Thus, in the end, Rowan's intention to circumvent the Act however objectionable it may have been, was completely thwarted once his progress report was made available to the defendants.

This court certainly does not approve or condone in the least Rowan's destruction of his notes, being mindful, as it is, of the admonition of the Court of Appeals of this circuit in United States *v.* Thomas, Second Circuit, 1960, 282 F. 2d 191, 194, that "it would be the better practice to preserve the written notes taken on interviews with persons accused or suspected of crime."

However, it may be fair to point out that Rowan's destruction of his notes occurred in February 1960, prior to the opinions handed down in the Campbell and Thomas cases, wherein this practice was judicially criticized.

What prejudice have the defendants sustained as a result of the destruction of Rowan's original handwritten notes? Defendants claim they have been deprived of an opportunity to use the notes to impeach Smith's testimony. Smith himself emphatically denied that he had ever seen Rowan's original notes; nor is there any evidence that these notes were ever approved or adopted by Smith. If Smith were to be believed there would have been no statements, reports or memoranda at all in existence relating to his testimony which might be producible under Section 3500. But, as the Supreme Court cautioned in Campbell, reliance solely upon the testimony of the Government witness in determining the producibility of statements under Section 3500 must be regarded as improper since the very issue to be determined is "whether the defense should have the document for use in cross-examining the witness." 365 U. S. at

As if in anticipation of the procedure recommended in the Campbell opinion, this court, as mentioned previously, held voir dire examinations of those federal narcotics agents who had worked with Smith in order to ascertain the existence of any documents to which the defendants would be entitled under the Jencks Act. And, as a result of these hearings, the existence of [illegible] was ultimately brought to light and its production and delivery ordered.

The defendants during the trial have been given all pertinent records, papers, memoranda, and so forth deter-

mined to be producible under Section 3500. Without waiting for an appropriate demand by the defendants, the Government has voluntarily made available to them photostatic copies of any existing relevant reports of agents and grand jury minutes relating to the testimony of Government witnesses before these witnesses actually took the stand. Exceptions were made only for the Government witnesses Edward Smith and Suzanne Cadieux.

With respect to Smith, defense counsel were not only supplied by the Government with Rowan's report 103 and the minutes of Smith's testimony before the grand jury, but also with Smith's testimony before a Royal Canadian Rogatory Commission in New York dealing with a case involving certain of the named defendants in the instant indictment then under investigation by the Canadian Government.

In Campbell v. United States, supra, Mr. Justice Brennan declared that the defendants there would have been denied a statement to which they were entitled under Section 3500 if an FBI interview report, which was the only document in the Government files at the time of the trial relating to the testimony given by the Government witness Stasiak, was not the original or a copy of the statement which the witness testified he had given to a Government agent and "thought he signed." Upon inspection of the Interview Report at a voir dire hearing the witness stated not only that he had never seen this report but also that it did not accurately reflect what he had told the agent. On the basis of this testimony alone, and without calling the agent who prepared the report, the trial court refused the defendants access to the Interview Report and denied their motion to strike the witness's testimony. Hence, in Campbell, the defendants were totally deprived of the use of any documents which might have been used to impeach the Government witness. As the Supreme Court pointed out, if the FBI Interview Report was not the original or a copy of the paper described by the Government witness,

there was the possibility that another paper or statement had existed which satisfied the description of the witness and which might have been destroyed. The unexplained loss of this document, if such did exist, plus the trial court's refusal to order the delivery of the Interview Report to the defendants under Section 3500 precluded defense counsel from any effective impeachment of the Government witness' testimony. The origin of the FBI Interview Report in Campbell therefore remained unknown and its relationship, if any, to the witness' original statement was likewise obscure. The failure of the trial court to resolve these questions led the Supreme Court to remand the case for further proceedings.

In United States v. Thomas, supra, 282 F. 2d 191, the Second Circuit Court of Appeals found that the destruction of an FBI agent's handwritten notes of an interview had with a Government witness did not prejudicially frustrate the defendants' cross-examination of the witness. As Circuit Judge Moore stated:

"* * * There was, however, a report which on the basis of credible evidence accurately reflected Demakakos' story as outlined in the agent's notes. Assurance of accuracy was given and the report delivered to defendants' counsel. Defendants thus had an opportunity to cross-examine Demakakos in the light of the story he told upon his interview and they thereby received the benefits intended to be bestowed by Section 3500."

282 F. 2d at 194-195.

It is true that in Thomas the Circuit Court found no intent to suppress evidence in the destruction of the agent's original notes. However, this consideration would appear to have been less decisive than the fact that there was nonetheless available to the defendants a report found to be a substantially accurate reproduction of the destroyed notes which was allowed to defense counsel for possible use in the cross-examination of the Government witness.

Of more vital and crucial significance, therefore, was the effect upon the defendants of the Government's inability to produce the agent's notes rather than the cause of their nonexistence, namely, prior destruction by the agent.

Hence, in the case presently on trial, the destruction of Rowan's notes, whether viewed as done wilfully in a deliberate attempt to avoid the application of the Jencks Act or as a routine method of disposing of such notes, did not in the final analysis preclude the defendants from receiving "the benefits intended to be bestowed by Section 3500."

United States *v.* Thomas, supra, 282 F. 2d at 195.

The attorneys for the defendants had at their disposal Rowan's report, marked Government's Exhibit 103 for identification, which, as I have mentioned, on the basis of all the credible evidence, elicited for the most part from Rowan himself, must be deemed a substantially accurate reproduction of the notes Rowan had taken during his interviews with Smith. Furthermore, according to Rowan, it was the report 103 alone which he read over with Smith to check its accuracy. Again Smith was subjected to a rigorous and extended cross-examination by defense counsel, who were able to pursue their interrogation with considerable latitude. The defendants were thus afforded an opportunity to cross-examine Smith "in the light of the story upon his interview and they thereby received the benefits intended to be bestowed by Section 3500."
United States *v.* Thomas, supra, 282 F. 2d at 194 and 195.

Included as well in the defendants' arsenal of impeachment material against the witness Smith were the minutes of his testimony before the Federal grand jury and the Royal Canadian Rogatory Commission, all of which were generously exploited by defendants from every possible angle to their best advantage.

Consequently, I am unable to find, after a careful study an [sic] evaluation of all the facts and circumstances in this

case, that the Government's inability to produce the handwritten notes taken by Rowan during his interviews with Smith, due to their prior destruction by Rowan prejudiced or frustrated the defendants' cross-examination of the Government witness Smith.

As the Court of Appeals advised in the Thomas case:

"In resolving this question the facts must be critically examined."

282 F. 2d at 193. The court has endeavored to be guided by this cogent admonition and concludes that it is constrained to deny the defendants' motion to strike the testimony of Smith.

Statutes Involved

TITLE 18, UNITED STATES CODE

§ 201. Bribery of public officials and witnesses

* * *

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom . . .

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

* * *

(j) Subsections (d), (e), (h) and (i) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

* * *

§ 209. Offer to witness

Whoever, directly or indirectly, gives or offers any money or thing of value, or any promise or agreement therefor, or any other bribe to any person being, or about to be, a witness upon a trial, hearing, or other proceeding, before any court or any officer authorized by the laws of the United States to hear evidence or take testimony, upon any agreement or understanding that his testimony shall be influenced thereby, or that he will absent himself from

the trial, hearing or other proceeding, shall be fined not more than $2,000 or imprisoned not more than two years, or both.

§ 3500. Demands for production of statements and reports of witnesses.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Statement of the Case

1. The Evidence against Petitioner

Petitioner was implicated in the conspiracy charged solely by the testimony of two witnesses.

At the first trial, one Mlle. Cadieux, a Montreal brothel-keeper with a criminal record, told a bizarre story of being present while petitioner, in Montreal, arranged for an American lawyer to buy narcotics. The American lawyer was to have stated that he could be counted on "to protect those who were pushing the heroin." (163-8a) Mlle. Cadieux refused to come to the United States for the second trial. (3874-77). She told the prosecutor that she would not return to "perjure herself". (248a) Her deposition was taken in Canada. She repudiated, as completely false, her testimony at the first trial (223-5a) and testified that she had been induced to incriminate petitioner by the hope of securing better treatment for her incarcerated paramour and the promise of money from the prosecuting authorities. (180a, 190a, 193a, 208a, 210a) At the second trial both the original testimony and the repudiation were admitted in evidence.* (8720-22)

The only other witness against petitioner was one Edward Lawton Smith, an underworld character, who told of an initial meeting with petitioner in Montreal during April or May, 1957,** at which he was entrusted with narcotics for delivery to New York. (144-54)

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* The prosecutor was twice permitted to testify that he had not the "slightest doubt" during the first trial that Cadieux' story was the truth (239-42a). Motions for a mistrial were denied with instructions to the jury that the prosecutor's testimony was admitted solely on the issue of whether the prosecutor had "suborned perjury" (259a, J. A. 133a).

** Smith dated the meeting differently at the first and second trials (1933-35). Many witnesses testified that the Montreal meetings could not have happened at the various places which Smith named (372-3a, 479-80a). In addition, Smith admitted that in 1958, in deportation proceedings in New York, he testified under oath that from April to October 1957, the period in issue, he worked 7 days a week in the Province of Ontario (126-8a).

Smith testified that he saw petitioner only twice more: both times in New York during June 1958. He testified that on the first of those occasions, he merely observed petitioner in a restaurant in the company of some other defendants. (41-2a) The second time, according to Smith, petitioner was supposed to have, at an open street corner rendezvous, entrusted him with narcotics for further delivery in New York (43-4a)—a story hardly consistent with the prosecution's and Smith's description of petitioner as the "top banana" of the conspiracy. (1196)*

Smith had been expelled from school at the age of 15 for lying. (135a) He had been twice convicted of burglary and he admitted that he had committed perjury before the Grand Jury which had returned the indictment. He admitted numerous other instances of perjury. He frankly said that he would perjure himself whenever "he was sufficiently afraid." (J. A., 133a)

2. The Illegal Derivation of the Evidence Against Petitioner

Between the middle of November 1959 and March 1960, narcotics agents, in cooperation with New York City detectives, engaged in extensive wiretapping of conversations to which petitioner was a party (Pet. App. 80a, 82a, 84a,

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* To contradict the testimony of Smith that petitioner was seen by him in New York on two different occasions during June 1958, petitioner introduced the testimony of several witnesses who saw petitioner in Florida almost continuously, from the beginning of May to July 20, 1958 (378-9a, 486-93a, 513a). Other witnesses, who could have filled vital gaps, were waiting to testify at the time when petitioner was without counsel (Pet. 8-16). Petitioner could not bring himself to make a decision, unaided by counsel, as to whether he should put them on and have them examined by the court (451-5a). Confronted by this hesitation, the court "freed them from the penalties of contempt" and they left (454-5a). The testimony of two, given at the first trial, was later read to the jury (486-93a).

85-6a, 93a). As a result, petitioner and others were subjected to extensive surveillance by the City detectives and the federal agents (Pet. App. 83-4a, 86-95a). However, neither the taps themselves nor the surveillance showed petitioner in any way to be connected with narcotics (Pet. App. 95-8a, 113a).

Among the narcotics agents who participated in the wiretapping, and the surveillance of petitioner which followed, was narcotics agent William A. Rowan (Pet. App. 80a, 85-6a). Fresh from these activities and frustrated because they revealed no evidence of guilt, Rowan, nonetheless, set out to vindicate suspicions first kindled by the wiretaps.

In January of 1960, he approached Smith, who, in October 1959, had received $5,000 for testifying before a Canadian Rogatory Commission. At that time he had not mentioned anything about petitioner (74-5a, 110-14a). Rowan testified that he initiated the negotiations for the illegal purchase of Smith's testimony as follows:

> "I began by explaining why I was there. I told him that I was authorized to offer him $5000 if he would testify against some defendants in a case which I was developing. I pointed out to him that he had already received monies in a previous case from the government, and that this was an entirely different matter." (405a)

At the first trial, Rowan described the same transaction as follows:

> "I told exactly what I was told, that the Government would pay him $5000 if he would testify in this case." (F. Tr. 6736)

When Smith explained that "he might not be able to help" because he was having financial "difficulty" Rowan "reiterated [his] promise or rather [his] guarantee of $5000 if he would testify . . . ." Smith then "indicated he was willing to testify for the government" (405a).

However, this transaction did not result immediately in Smith's naming of petitioner as a "conspirator". Petitioner was not mentioned in Smith's first statement to Rowan in January 1960 (Court's Ex. A-51A for identification, Di Pietro's Ex. AO in evidence).

Difficulty arose in February 1960, just prior to Smith's first scheduled testimony. Smith refused to make his initial appearance before the Grand Jury which returned the indictment because "he had received no payment . . ." (7792; see also, F. Tr. 6740, 6743). Smith entered the Grand Jury room to give testimony only after, in the Grand Jury anteroom, three federal agents promised him $1500 for so doing (F. Tr. 6737-9, 7786-7). Thereafter, Smith was paid the $1500 promised* (F. Tr. 6744).

Still, petitioner was not named in Smith's Grand Jury testimony. (109-10a, 113-4a)

Smith only spoke of petitioner in connection with other defendants at the end of April 1960—"a week or two weeks prior to his last appearance before the Grand Jury". This was at the time Smith was put on a "per diem" and began receiving $360 to $370 a month as an added "inducement" to testify. (F. Tr. 6829) He continued to be paid his "per diem" during his testimony at the first and second trials (64-5a; 2456) (F. Tr. 6813-14) Up to that time he had only spoken of petitioner as a man known by him to be part owner of a restaurant in Canada. This, even though Rowan showed him a photograph of petitioner "about

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*Smith received an additional $2,500 for expenses and witness fees (J. A. 133a). Rowan testified that Smith was offered other "things of value for his testimony". He was promised that if he "would just go along" he could probably "realize a lot of money" from "the sale of the story of this trial" because Rowan's District Supervisor knew a magazine writer who wrote stories about narcotics (7709-10; F. Tr. 6827-8). Smith was also told that he might make money from "various television programs that were on this particular subject at that time . . ." (7710; F. Tr. 6828-9).

twenty times"—"as often as [he] carried" it. (F. Tr. 6811-2; 7721)

Even then, Smith told Rowan that he had seen petitioner "only two times"—in the Spring of 1957 and in June of 1958. (F. Tr. 6815-6)

Only later, after his last Grand Jury appearance, did Smith describe a third meeting with petitioner—a fantastic street corner rendezvous at which Galante, the accused chief man in the conspiracy, entrusted him with narcotics for distribution in New York City (135-6a; *supra* (App. 23a)).

Smith frankly admitted that one of the "prime considerations" for his giving testimony at trial was that he was on the government payroll. He also testified about his understanding at the first trial that he could receive an additional "reward". (65-7a)

3. The Improper Destruction of the Witness' "Jencks Act" Statement

At the conclusion of Smith's direct testimony at the first trial, petitioner's counsel requested Jencks Act* material, *inter alia*, notes of federal agents to whom Smith had made statements about the case. (F. Tr. 1895-96)** For two days the chief prosecutor blandly assured the court that the government had no such statements in its possession. (F. Tr. 1896-97, 1901-2, 1904, 3264, 3269-71, 3273) Four agents who had participated in the investigation of the case were still in government employ and none of them recollected that any statements were taken. (F. Tr. 3304-5) According to the prosecutor Rowan, the fifth agent, who had by then left government employ, "could not be immediately located." (F. Tr. 3306) The prosecutor suggested that the

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* 18 U. S. C. §3500.

** Rowan was in fact contacted on the morning of the second day by Agent Matuozzi, who, when Rowan told him of the existence of Jencks material said "I wish you hadn't told me that." (F. Tr. 6963-64)

court could dispense with Rowan's testimony since District Supervisor Gaffney would be "familiar" with whether Rowan had taken any statements from Smith. (F. Tr. 3309). Actually, Gaffney, on locating Rowan, attempted by threats to discourage him from testifying to the existence of Jencks Act statements.*

Despite the threats, Rowan appeared and testified, in substance, that he had taken "substantially verbatim" handwritten notes of the witness' statements about the case: (F. Tr. 3675-77, 3694; 6697). He incorporated the substance of those notes in a typewritten "progress report". (F. Tr. 3678-79, 3794-92). However, he omitted from the typewritten report matters which he deemed "unimportant" and added others which he obtained from sources other than Smith. Moreover, he changed the phraseology to reflect what Smith had said entirely in the third person, and he improved the verbiage. (F. Tr. 3694, 6936). Thus it was made difficult, if not impossible, to determine precisely what was said by Smith and what was said by others. The copy of the typewritten report which was ultimately found had been "gone over" with Smith and handwritten changes, some in Smith's handwriting, were made on that copy. (F. Tr. 6150-52). Ultimately, Smith denied ever having seen the report, or, for that matter, ever having made a statement to Rowan (App. 3a). Incidentally, the court disbelieved Smith and expressed his conviction "of the authenticity" of the report (App. 4a).

At least four copies had been made of this report. Two were furnished to Gaffney, Rowan's former supervisor, one to the prosecutor, and one had been retained by Rowan in the file which he had kept at the Bureau of Narcotics. (F. Tr. 3768, 3792, 3805-6).

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* Gaffney threatened Rowan by telephone that "if [he] testified that [Jencks materials] existed he [Gaffney] would have to get up and say certain things about [him]" which would put his job "in jeopardy . . . ." (F. Tr. 6943-44, 6947).

Unfortunately, the prosecutor, as well as the four agents still in government employ, had no recollection whatsoever of the preparation of this crucial report.* (F. Tr. 3690, 3779, 3486-88, 3493, 3521, 3530-31, 3534-36, 3543-45, 3547-48). Not only had all the persons concerned with the prosecution and still in government employ succumbed to this lapse of memory, but the government files themselves were strangely incomplete, for the basic report in the case was nowhere to be found. (F. Tr. 3683-91, 3717-19). No copy could be found except Rowan's personal copy, which he was able to locate in an unlikely place. (F. Tr. 3730-37).

Perhaps the unlikelihood of the place where Rowan was able to locate his copy of the report saved that copy from whatever forces were responsible for the disappearance of the other copies. In any case, the one surviving copy was turned over to the defendants and was eventually received in evidence. (DiPietro's Ex. AO in evidence.) Smith taking the lead of the government, then did his bit "[t]o circumvent the Jencks decision", denying ever having seen the typed report and any responsibility for its contents.

The defendants moved to suppress the testimony of Smith on the ground that his original statement to Rowan, i.e., the handwritten notes, had been destroyed. Rowan had

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* Rowan testified that the prosecutor went over the report with Smith in his presence (F. Tr. 3768, 3792, 3805-6). The prosecutor did not recall. Nor did he recall whether certain of the handwritten insertions and corrections on the report were made by him (F. Tr. 3769). Rowan also testified that the prosecutor, with narcotic agents, used the statement in interrogating Smith, and had a copy of it with him when he spoke to Smith in the Grand Jury anteroom (F. Tr. 3695, 6756-57).

If it could be shown that the prosecutor did recall the Rowan report and Smith's familiarity with it, an additional ground for reversal of petitioner's conviction would be presented, for "the defense" impeachment of Smith, the main witness against petitioner, was hindered by the perjured testimony. *Napue* v. *Illinois*, 360 U. S. 264.

explained that he had destroyed his contemporaneous and verbatim handwritten notes of Smith's statements to him "[s]o that they would not become available under the Jencks decision." (F. Tr. 6929; see also F. Tr. 7162.)

Moreover, his typewritten report was deliberately dictated in the "third person" because he "understood that if such were done it wouldn't fall under the Jencks decision." (F. Tr. 6904, 6908). In passing we might note that Rowan's changes probably took the typewritten report out of the category of statements described in 18 U. S. C. § 3500 (e) (2), i.e., substantially verbatim statements. The trial court thought that it was probably producible under both subsections (e) (1) and (e) (2) (App. 10a).

The trial court found that Rowan's original handwritten notes were "a substantially verbatim" recital of "an oral statement" and producible under subsection (e)(1). The trial court further found that they were destroyed by Rowan with the intent to deprive the defendants of rights accorded them by the Jencks Act. (App. 12a, 14a.) Nonetheless the trial court refused to strike Smith's testimony. The court advanced as a possible justification for its holding the doctrine that estoppel should not run against the sovereign, i.e., that the government should not be cheated out of a conviction because someone as "subordinate" in the governmental hierarchy as a narcotic agent had deprived the defendants of rights which this Court and Congress has accorded them. (App. 12-14a.)

The trial court also suggested that "subsection (d) on its face has no application in and of itself" where the "government's failure to produce is due to a prior destruction of the statement" (App. 11a).

The main justification for the court's holding, however, was that the defendants had not been harmed by the admitted deprivation of their rights because the typewritten report was a substantially accurate reproduction.

of the original handwritten notes (App. 10a, 18a). The destroyed notes were, of course, not available to the trial court. In holding that they were substantially identical with the typewritten report the court had to disregard the fact that the typewritten report contained material that, according to Rowan, did not come from Smith. The court also had to rely on Rowan's editorial skill in eliminating only what was "unimportant".

The motion to strike Smith's testimony because of the destruction of the handwritten notes was renewed at the second trial. The court incorporated the Rowan *voir dire* of the first trial in the record and adopted the opinion of the first trial court so that petitioner's appeal properly brought up the entire proceeding for review (805l).